

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER 2, 2009 Session

**STATE OF TENNESSEE, ex rel CEDRIC CARTWRIGHT
v. SYLVIA HOLLOWAY**

**Direct Appeal from the Juvenile Court for Davidson County
No. 9819-40167 Rebecca Montgomery, Special Judge**

No. M2009-00928-COA-R3-JV - Filed January 20, 2010

The juvenile court modified custody from Mother to Father, and ordered Mother to pay child support. When Mother failed to appear at the child support review hearing, an order was entered increasing her support obligation, and entering a judgment for child support arrearage against her. Because Mother apparently did not receive notice that the order had been entered such that she could institute an appeal, we find that she is entitled to relief pursuant to Tennessee Rule of Civil Procedure 60.02(5). Thus, we reverse the trial court's denial of Mother's motion to set aside the September 20, 2007 order, and we remand to the juvenile court for further proceedings.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Juvenile Court Reversed
and Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Mike J. Urquhart, Nashville, Tennessee, for the appellant, Sylvia Holloway

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Warren Jasper, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee, ex rel Cedric Cartwright

MEMORANDUM OPINION ¹

I. FACTS & PROCEDURAL HISTORY

Sylvia Holloway (“Mother”) and Cedric Cartwright (“Father”) had a child together. The parties were never married, and at the original parentage hearing Mother was awarded custody of the child. Father filed a petition to change custody, and was named the child’s primary residential parent in a December 28, 2005 juvenile court custody order. Mother appealed, and a *de novo* review hearing was held before a special judge on September 27, 2006. The special judge granted Father’s petition to modify custody and set the issue of child support for a November 6, 2006 hearing. Following the November 6 hearing, at which both Mother and Father as well as their respective attorneys were present, an order was entered setting mother’s child support obligation at \$125.00 per month. The order set the issue of accuracy of current support for a review hearing on September 20, 2007.²

Mother failed to appear at the September 20, 2007 review hearing, and an order was entered altering Mother’s current support obligation to \$368.00 per month,³ and granting a \$5,888.00 judgment against Mother for retroactive support. The order’s certificate of service indicates that Father was personally served in court and that Mother was served by “[m]ailing to the address on Addendum A.” However, the certificate of service is unsigned, and no “Addendum A” is attached to the order.

On June 4, 2008, Mother filed a counter petition to modify support. On July 22, 2008, she filed a motion to set aside the court’s September 20, 2007 order, claiming that she did not earn the income imputed to her and stating that during the nine months between the November 6, 2006 and September 20, 2007 orders that she had a child and changed her residence. Mother’s motion to set aside the order was denied; however, her current child support obligation was modified to \$239.00 per month, and then later modified, again, to

¹ Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

² The order’s certificate of service indicates that Mother and Father were personally served with a copy of the November 6, 2006 order in court.

³ The trial court’s order noted that because Mother failed to appear, her income was imputed “per the guidelines[.]”

\$265.00 per month. Mother filed a notice of appeal to this Court on April 26, 2009.⁴

II. ISSUES PRESENTED

Mother has timely filed her notice of appeal and presents the following issue for review:

1. Did the trial court err when it failed to set aside the September 20, 2007 order of the court?

III. DISCUSSION

On appeal, Mother identifies several bases for her assertion that the trial court erred in not setting aside the September 20, 2007 order: Mother's failure to attend the hearing was due to excusable neglect; the order was defective on its face which prevented Mother from receiving a copy of such; the court imputed income to her beyond the amount allowable; the court erred in awarding retroactive support; the court failed to consider the Child Support Guidelines; and the court failed to consider the totality of the circumstances.

First, we address Mother's contention that the September 20, 2007 contained "material defects" which prevented Mother from receiving proper notice of the order's entry. At the hearing on her motion to modify her support obligation, Mother testified that she did not receive a copy of the September 20, 2007 order. As we stated above, the order was not signed by either Mother or her counsel, and although the order's certificate of service indicates that Mother was served by "[m]ailing to the address on Addendum A[.]" no "Addendum A" is attached. Furthermore, the certificate of service is undated, and it is unsigned.⁵

Tennessee Rule of Civil Procedure 58 provides in part:⁶

⁴ Although Mother's notice of appeal fails to specify from which order she appeals, Mother's brief to this court explains that she appeals from the trial court's denial of her motion to set aside the September 20, 2007 order. **See Tenn. R. App. P. 3, Advisory Comm'n Cmt. (f).**

⁵ The certificate of service is initialed "HH[.]"

⁶ Rule 1(b) of the Rules of Juvenile Procedure provides that the Tennessee Rules of Civil Procedure shall govern the proceedings in juvenile court in certain types of cases, including child custody proceedings under specific statutes. **Tenn. R. Juv. P. 1(b).** This action began as a proceeding to determine the custody of a child born out of wedlock, and thus fits within those "child custody proceedings" governed by the Rules (continued...)

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

- (1) the signatures of the judge and all parties or counsel, or
- (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
- (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

As this Court stated in *Steppach v. Thomas*, No. W2008-02549-COA-R3-CV, 2009 WL 3832724, at *4 (Tenn. Ct. App. Nov. 17, 2009):

“The purpose of [Tenn. R. Civ. P. 58] is to insure that a party is aware of the existence of a final, appealable judgment in a lawsuit in which he [or she] is involved.” *Masters ex rel. Masters v. Rishton*, 863 S.W.2d 702, 705 (Tenn. Ct. App. 1992); *see also* Tenn. R. Civ. P. 58, advisory comm’n cmt. (stating that Rule 58 “is designed to make uniform across the State the procedure for the entry of judgment and to make certain the effective date of the judgment.” Compliance with Rule 58 is mandatory, *State ex rel. Taylor v. Taylor*, No. W2004-02589-COA-R3-JV, 2006 WL 618291, at *2 (Tenn. Ct. App. Mar. 13, 2006) (quoting *Gordon v. Gordon*, No. 03A01-9702-CV-00054, 1997 WL 304114, at *1 (Tenn. Ct. App. June 5, 1997)), and “[t]he failure to adhere to the requirements set forth in Rule 58 prevents a court’s order or judgment from becoming effective.” *Blackburn v. Blackburn*, 270 S.W.3d 42, 49 (Tenn. 2008) (citing *DeLong v. Vanderbilt Univ.*, 186 S.W.3d 506, 509 (Tenn. Ct. App. 2005)).

Steppach, 2009 WL 3832724, at *4.⁷ Although failure to comply with Rule 58 may prevent

⁶(...continued)
of Civil Procedure. *See Tenn. Code Ann. § 37-1-104 (f)*. Accordingly, we apply the Rules of Civil Procedure in this child support action.

⁷We note that although Tennessee Rule of Civil Procedure 5.01 provides that “no service need be made on parties adjudged in default for failure to appear,” this rule simply “allows default judgments to take effect without any service *as long as the clerk complies with Rule 58*.” *State v. Vann*, No. 03C01-9403-CR-00125, 1994 WL 699055, at *2 (Tenn. Cr. App. Dec. 15, 1994).

an order from becoming a final, appealable judgment,⁸ it “does not invalidate the judgment.” *Hewitt v. Cook*, No. M2008-01569-COA-R3-CV, 2009 WL 2971057, at *6 (Tenn. Ct. App. Sept. 16, 2009) (citing *Clark v. Wayne Med. Ctr.*, No. M2005-00699-COA-R3-CV, 2007 WL 1585166, at *4 (Tenn. Ct. App. May 31, 2007); *State v. Williams*, No. 03C01-9404-CR-00148, 1995 WL 13112, at *2 n.2 (Tenn. Crim. App. Jan. 13, 1995)).

Having found the September 20, 2007 order valid despite its failure to comply with Rule 58, we next address Mother’s contention that she is entitled to relief pursuant to Tennessee Rule of Civil Procedure 60.02. The Rule provides:

“[o]n motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . . (3) the judgment is void; . . . or (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02. On appeal, Mother argues that the order should be set aside, contending that her failure to attend the September 20, 2007 hearing was the result of excusable neglect. She claims that she forgot about the court date due to having moved and given birth to a child between the time she received notice of the hearing and the actual hearing date. Additionally, she alleges that she believed she was being represented by Vanderbilt Legal Clinic, which did not remind her of the hearing.

We review a trial court’s decision regarding a Rule 60.02 motion under the abuse of discretion standard. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). To proceed under ground one of Rule 60.02 “a party must present properly supported facts explaining why he or she was justified in failing to avoid mistake, inadvertence, surprise or neglect.” *Dockery v. State*, No. M2006-00014-COA-R3-CV, 2007 WL 2198195, at *3 (Tenn. Ct. App. July 23, 2007) (citing *Travis*, 686 S.W.2d at 70; *Hopkins*, 572 S.W.2d at 640, *Turner v. Turner*, 76 S.W.2d 88, 92 (Tenn. Ct. App. 1988)). Because Mother seeks relief under Rule 60.02, she carries the burden of proof. *Henry*, 104 S.W.3d at 482 (citing *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991)). “The bar for obtaining relief is set very high, and the burden borne by the moving party is heavy.” *Dockery*, 2007 WL 2198195, at *2 (citing *Johnson v. Johnson*, 37 S.W.3d 892, 895 (Tenn. 2001)). As our Supreme Court has stated,

“[M]ere negligence or inattention of a party is no ground for vacating a

⁸As we stated above, the September 20, 2007 order is *not* the order appealed from.

judgment against him. Carelessness is not synonymous with excusable neglect. Mere forgetfulness of a party to an action is not a sufficient ground for vacating or setting aside a judgment by default. Parties are not justified in neglecting their cases merely because of the stress or importance of their own private business and such neglect is ordinarily not excusable.”

Food Lion, Inc. v. Washington County Beer Bd., 700 S.W.2d 893, 896 (Tenn. 1985) (quoting 46 Am. Jur. 2d 874-75 *Judgments* § 718 (1969)). Thus, we find that Mother’s forgetfulness does not equate to excusable neglect. Likewise, we reject Mother’s argument that her legal representative’s failure to remind her of the hearing resulted in excusable neglect. Accordingly, we find that Mother is not entitled to relief pursuant to Rule 60.02(1).

However, we find that because the evidence arguably demonstrates that Mother did not receive a copy of the September 20, 2007 order from which she could launch an appeal, this case constitutes one of “extraordinary circumstances or extreme hardship[,]” *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000) (citing *Underwood*, 854 S.W.2d at 97), such that relief under Rule 60.02(5)⁹ is appropriate. Accordingly, we reverse the trial court’s denial of Mother’s motion to set aside the September 20, 2007 order, and we remand for further proceedings in the juvenile court.

V. CONCLUSION

For the aforementioned reasons, we reverse the trial court’s denial of Mother’s motion to set aside the September 20, 2007 order, and we remand to the juvenile court for further proceedings. Costs of this appeal are taxed to Appellee, Cedric Cartwright, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

⁹At the hearing on Mother’s motion to set aside, Mother’s attorney argued that relief was appropriate under Rule 60, “not only under excusable neglect[,]” but also because “the order is no longer just.”